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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS HOVIE,

Defendant and Appellant.

B292073

(Los Angeles County
Super. Ct. No. BA463861)

APPEAL from a judgment of the Superior Court of Los Angeles County. Norman J. Shapiro, Judge. Affirmed and remanded with directions.

Michael C. Sampson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Yun K. Lee and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

Thomas Hovie appeals the judgment entered following a jury trial in which he was convicted of two counts of second degree robbery. (Pen. Code,¹ § 211.) Appellant admitted, and the trial court found true the allegations that appellant had suffered two prior serious felony convictions (§§ 667, subd. (a)(1); 667, subds. (b)–(j); 1170.12) and he had served four prior prison terms (§ 667.5, subd. (b)). The trial court sentenced appellant to a term of 22 years in state prison, consisting of the high term of five years, doubled to ten years on count 1, a consecutive term of one year doubled to two years on count 2, plus five years for each of the prior serious felony enhancements.²

Appellant contends remand for resentencing is required because the trial court erroneously believed it was required to impose a consecutive sentence on count 2. We agree and therefore remand the matter for resentencing to enable the trial court to exercise its discretion as to whether to impose a consecutive or a concurrent sentence on count 2. The judgment of conviction is otherwise affirmed.

FACTS AND PROCEDURAL BACKGROUND

Around 3:30 a.m. on July 8, 2017, John Morgan was waiting for a train in the Metro Red Line station at Hollywood and Highland. Seated on the bench next to Morgan was Mathew Rivera, whom Morgan described as a “dwarf.” Appellant entered the station with two other men and asked Morgan, “Where are

¹ Undesignated statutory references are to the Penal Code.

² The trial court struck one of the prior strike convictions and struck all one-year enhancements for appellant’s prior prison terms.

you from white boy?” Before Morgan could respond, appellant kicked him in the face and then kicked him two more times while Morgan was on the ground. Appellant then took Morgan’s hat and ripped the chain from Morgan’s neck, and asked, “What else do you got?” At this point, Rivera told appellant to leave Morgan alone. Appellant turned and kicked Rivera in the chest, knocking him backwards over the bench. Morgan got up and began to flee. As Morgan ran, appellant tried to grab him and pulled the bandana out of Morgan’s back pocket. Moments later, station surveillance video showed appellant with Morgan’s hat and the vest Rivera had been wearing.

When police arrived, appellant was still in the Metro station. He was wearing Morgan’s hat and bandana, and dress shoes that were extremely small for him. Rivera, who was being treated by paramedics on the scene, was not wearing any shoes.

DISCUSSION

The Trial Court Had Discretion to Impose Concurrent Sentences for Appellant’s Convictions, but Erroneously Believed Consecutive Sentences Were Mandatory. The Matter Must Be Remanded for Resentencing.

Appellant contends the matter must be remanded for resentencing because the trial court misunderstood the scope of its sentencing discretion and erroneously believed it was required to impose a consecutive sentence on count 2. Respondent counters with two arguments: (1) The Three Strikes law mandates imposition of a consecutive sentence for count 2 here because the two robberies were neither committed on the same occasion nor arose from the same set of operative facts; and (2) In any event, the trial court did not misunderstand the scope of its

sentencing discretion and properly exercised it in imposing the consecutive term. We reject both of respondent's arguments.

1. *The trial court had discretion to impose concurrent sentences because the two robberies were committed on the same occasion and arose from the same set of operative facts.*

The Three Strikes law mandates that the trial court impose consecutive sentences for subordinate terms where a defendant who has one or more prior serious felony convictions has been convicted of multiple felonies that were not committed on the same occasion and did not arise from the same set of operative facts. (§§ 667, subd. (c)(6) & (7), 1170.12, subd. (a)(6) & (7);³ *People v. Hendrix* (1997) 16 Cal.4th 508, 512; *Deloza, supra*, 18

³ Section 667, subdivision (c)(6) and (7) provides:

“(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior serious or violent felony convictions as defined in subdivision (d), the court shall adhere to each of the following: [¶] . . . [¶]

“(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

“(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.”

The corresponding subdivision in section 1170.12 ((a)(6) and (7)) is virtually identical. (See *People v. Deloza* (1998) 18 Cal.4th 585, 588, fn. 3 (*Deloza*).)

Cal.4th at pp. 588, fn. 3, 590.) On the other hand, the trial court retains discretion to sentence counts of conviction concurrently rather than consecutively if it finds the current felonies were committed on the same occasion or arose from the same set of operative facts. (*People v. Lawrence* (2000) 24 Cal.4th 219, 233 (*Lawrence*); *Deloza*, at pp. 590–591.)

Our Supreme Court has explained that “[t]he phrase ‘committed on the same occasion’ is commonly understood to refer to at least a close temporal and spatial proximity between two events.” (*Deloza, supra*, 18 Cal.4th at p. 594; *Lawrence, supra*, 24 Cal.4th at p. 226.) In *Deloza*, our Supreme Court found such a close proximity existed where “defendant [had] entered a furniture store, robbed four victims, and left. His robberies were committed in one location, and were apparently brief in duration. They were committed essentially simultaneously against the same group of victims, i.e., persons in the furniture store. While [a customer] approached defendant, his criminal activity was not thereby interrupted, but merely continued with her as an additional victim. Nor was there any other event that could be considered to separate one ‘occasion’ of robbery from another. Given the close temporal and spatial proximity of defendant’s crimes against the same group of victims, they were clearly committed on the ‘same occasion.’” (*Deloza, supra*, 18 Cal.4th at pp. 595–596.) In these circumstances the court held consecutive sentencing under the Three Strikes law was not mandatory. (*Id.* at p. 595.)

Applying the same reasoning here, we find appellant committed the robberies against Morgan and Rivera “on the same occasion.” The two men were seated next to each other on the same bench on the train platform when appellant used force to

take Morgan's chain and hat. While Morgan was still on the ground, appellant initiated the robbery against Rivera by kicking him in the chest. Appellant concluded the taking element of the Morgan robbery by taking the bandana from Morgan's back pocket. Appellant then took Rivera's vest, and when police arrived Rivera was barefoot while appellant was wearing dress shoes that were obviously too small for him. The force and taking elements of the two robberies thus inextricably intertwined, appellant plainly committed the two crimes against the same group of victims in close temporal and spatial proximity, and hence "on the same occasion." (*Deloza, supra*, 18 Cal.4th at p. 596.)

Respondent attempts to distinguish *Deloza* by characterizing the two robberies as completely separate events that only happened to take place at the same location. Asserting that appellant began to rob Rivera only after he had taken Morgan's bandana and Morgan had fled the scene, respondent claims the robbery of Morgan was completed before the robbery of Rivera even began. Respondent's argument is belied not only by the record but by the sequence of events as described in respondent's own brief. Even according to respondent, the two robberies occurred simultaneously: appellant used force against Morgan and took his hat and chain; he then used force against Rivera before he completed the taking against Morgan by grabbing his bandana; after Morgan fled, appellant completed the taking against Rivera. Here, as in *Deloza*, "the crimes were so closely related in time and space, and committed against the same group of victims, that these factors alone compel us to conclude they occurred on the 'same occasion.'" (*Deloza, supra*, 18 Cal.4th at p. 599.)

The interlocking sequence of events in this case also demonstrates that both robberies “[arose] from the same set of operative facts.” Our Supreme Court has interpreted that phrase to include “the same concepts of closeness in time and space as the phrase ‘same occasion’ found in [section 667,] subdivision (c)(6).” (*Lawrence, supra*, 24 Cal.4th at p. 231.) “Operative facts,” in turn, refer “‘to the facts underlying the current charged offenses.’” (*People v. Durant* (1999) 68 Cal.App.4th 1393, 1405 (*Durant*); *Lawrence*, at p. 232.) Thus, as *Durant* explained, “In applying this definition to any particular case, the nature and elements of the current charged offense [become] highly relevant. For example, when a robbery is charged, its continuous nature, its elements and the facts used to support those elements are the ‘operative facts’ underlying the commission of that crime. If another offense is committed while the facts underlying that robbery are unfolding, it will necessarily arise from the same set of operative facts as the original robbery. However, where the elements of the original crime have been satisfied, any crime subsequently committed will not arise from the same set of operative facts underlying the completed crime; rather such crime is necessarily committed at a different time.” (*Durant*, at pp. 1405–1406; *Lawrence*, at p. 232.)

In this case, because the first robbery was ongoing when the second robbery began, the two offenses “shar[ed] common acts or criminal conduct that serv[ed] to establish the elements of the current felony offenses of which defendant stands convicted,” and thus “[arose] from the same set of operative facts.” (*Lawrence, supra*, 24 Cal.4th at p. 233.) Consecutive sentencing was therefore not mandatory under the Three Strikes law, but permissible in the trial court’s exercise of its discretion.

2. The trial court's statement reveals it was unaware of its discretion to impose a concurrent rather than a consecutive sentence for count 2.

Respondent contends that even if consecutive sentences were not mandatory, the trial court was aware of its sentencing discretion and did not abuse that discretion by imposing a consecutive sentence on count 2. We disagree.

Just before it pronounced sentence, the trial court explained that appellant was facing a possible term of 30 years to life on count 1 plus the sentence on count 2, which “the law requires” “be imposed consecutively.” The court then proceeded to sentence appellant consecutively on count 2 without mention of any discretion to do otherwise. Contrary to respondent’s assertion, there appears nothing ambiguous about the court’s statement that “the law requires” consecutive sentencing, and as the only comment on the subject, it does not indicate the court recognized its discretion to impose a concurrent sentence on that count.

Respondent points to the trial court’s exercise of discretion in striking one of appellant’s strikes as well as the four prior prison term enhancements to argue that the court understood the full extent of its sentencing discretion. But where the trial court failed to exercise its discretion in one area, its exercise of discretion in other areas does not establish that the court understood the full scope of its discretion. (See, e.g., *People v. McDaniels* (2018) 22 Cal.App.5th 420, 428 (*McDaniels*) [trial court’s exercise of discretion to reduce defendant’s sentence did not preclude the possibility that it would exercise new sentencing discretion on remand].)

Further, the trial court could not have exercised discretion it did not know it had. In acknowledging its discretion with respect to other aspects of the sentence, the court explained in some detail how and why it was exercising that discretion. But no such statement of reasons accompanied the trial court's imposition of the consecutive sentence on count 2. The trial court's failure to state its reasons for that discretionary choice, together with its declaration that a consecutive sentence was legally required compels the conclusion that the trial court was simply unaware of its discretion in this regard. (See Cal. Rules of Court, rule 4.406; *People v. Black* (2007) 41 Cal.4th 799, 822 [trial court must state the " 'primary factor or factors' " supporting the decision to impose consecutive sentence]; *People v. Dixon* (1993) 20 Cal.App.4th 1029, 1037 [trial court erred in failing to state reasons for consecutive sentences on record].)

This conclusion is bolstered by the trial court's declaration that even if it had discretion to strike the five-year enhancement under section 667, subdivision (a), it would not do so. The fact that the trial court went out of its way to explain that it would not exercise discretion it acknowledged it did not even have while failing to recognize the discretion it did have demonstrates at least a misunderstanding of the scope of its sentencing discretion under sections 667, subdivision (c)(6) and (7) and 1170.12, subdivision (a)(6) and (7).

3. Appellant's claim is cognizable on appeal, and remand for resentencing is required.

Respondent asserts appellant forfeited his claim by failing to object or otherwise inform the trial court of its discretion to impose concurrent sentences. We disagree.

Even though “a party in a criminal case may not challenge the trial court’s discretionary sentencing choices on appeal if that party did not object at trial” (*People v. Gonzalez* (2003) 31 Cal.4th 745, 748; *People v. Scott* (1994) 9 Cal.4th 331, 356), “[a]n appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party” (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6). A trial court’s failure to exercise the discretion vested in it by law comes within the “narrow class of sentencing issues that are reviewable in the absence of a timely objection.” (*People v. Leon* (2016) 243 Cal.App.4th 1003, 1023.) Thus, “[a] ruling otherwise within the trial court’s power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law. [Citations.]’ [Citation.] ‘Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal. [Citations.]’ [Citation.] Where, as here, a sentence choice is based on an erroneous understanding of the law, the matter must be remanded for an informed determination.” (*People v. Downey* (2000) 82 Cal.App.4th 899, 912.) Further, as *McDaniels* explained, “[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to “sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court,” and a court that is unaware of its discretionary authority cannot exercise its informed discretion.’” (*McDaniels, supra*, 22 Cal.App.5th at p. 425.)

People v. Weddington (2016) 246 Cal.App.4th 468, cited by respondent, is inapposite. There, the prosecution's arguments that the court should impose a felony rather than a misdemeanor sentence on one of the counts were unopposed by the defendants, and the record on appeal "[did] not support appellants' contention that the trial court was unaware of the scope of its sentencing discretion." (*Id.* at p. 491.) Here, the trial court failed to exercise its discretion, and in contrast to *Weddington*, there is nothing in the record to suggest the court was aware of its discretion. Appellant's claim is not forfeited, and the trial court's failure to exercise its discretion requires remand in this case.

DISPOSITION

The matter is remanded with directions that the trial court exercise its discretion as to whether to impose a consecutive or a concurrent sentence on count 2. The trial court is further ordered to forward the corrected abstract of judgment to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.